UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Sacred Heart of Jesus Parish; Joseph and **Renee Boutell**; **Peter** and **Katie Ugolini**,

Plaintiffs,

v.

Dana Nessel, in her official capacity as Attorney General of Michigan; **John E. Johnson, Jr.**, in his official capacity as Executive Director of the Michigan Department of Civil Rights; **Portia L. Roberson**, **Zenna Faraj Elhason**, **Gloria E. Lara**, **Regina Gasco-Bentley**, **Anupama Kosaraju**, **Richard Corriveau**, **David Worthams**, **and Luke R. Londo**, in their official capacities as members of the Michigan Civil Rights Commission,

Defendants.

Case No. 1:22-cv-01214

Honorable Jane M. Beckering
Magistrate Judge Phillip J. Green

Plaintiffs' Combined Reply in Support of Their Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment

Oral Argument Requested

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Introduction

Defendants can't get their story straight. They have repeatedly changed their position on whether and when the Act prohibits Plaintiffs' religious conduct, sometimes taking different positions within a single deposition. Plaintiffs deserve a declaration and injunction that prevents Michigan's Attorney General, Civil Rights Director, and Civil Rights Commission from enforcing the Act against Sacred Heart's (i) employment policies, including as applied to the Art Teacher, Athletic Coach, and Sexton positions; (ii) pronoun policy; (iii) educational policies, including separation of facilities and activities by biological sex; and (iv) publications about those policies.

Michigan largely avoids the merits by retreating to a discretionary and unbounded "permitted by law" exception. But the Sixth Circuit already held that the exemption "is not so clear that it renders" ELCRA "obviously inapplicable to" the ministry's activities. *Christian Healthcare Centers, Inc. v. Nessel* (*CHC*), 117 F.4th 826, 847 (6th Cir. 2024). Discovery confirmed that conclusion. Michigan's witnesses contradicted each other—and themselves—about how ELCRA applies. And these reversals occurred without any change in the facts or law. Michigan also refused to follow any formal process to bind future enforcement officials. All this back-and-forth means no issue is moot. Sacred Heart still faces a credible threat of future enforcement. A declaratory and injunctive order from this Court is necessary to remove that threat.

The merits show Plaintiffs are entitled to relief. The First and Fourteenth Amendments protect Sacred Heart's choice to employ those who share its faith, use pronouns consistent with its beliefs, educate children according to its faith, and be free from vague, overbroad laws. Michigan disputes no other element for Plaintiffs' declaratory judgment or permanent injunction. So, Plaintiffs ask this Court to enter judgment in their favor.

Argument

Plaintiffs deserve summary judgment in their favor because Michigan does not dispute "any material fact." Fed. R. Civ. P. 56. True, Michigan now suggests that Sacred Heart's employment decisions on Art Teachers and the ministry's pronoun and education policies may be "permitted by law." But this late revelation is an "intervening circumstance," and Michigan "bears the burden" to prove the change moots even that part of the case. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022). Even accepting Michigan's paper-thin claims alluding to mootness, Michigan is far from meeting its heavy burden.

I. Plaintiffs have standing to challenge ELCRA and to enjoin each named defendant.

The "developed factual record" shows that Plaintiffs have standing to enjoin the named defendants from enforcing ELCRA because they have an injury that is "caused by the defendant's conduct" and "redressable by a favorable court decision." *CHC*, 117 F.4th at 842, 854 (6th Cir. 2024) (citation modified). At a minimum, Defendants stipulated that the Act applies in full force to Sacred Heart's nonministerial positions and prohibits the schools' faith-based policies. ECF No. 83, PageID.1453-1456.

A. Plaintiffs established an injury-in-fact.

Plaintiffs satisfy the injury-in-fact prong because they face a "substantial risk" of being harmed by ELCRA. *CHC*, 117 F.4th at 843 (citation modified). A "threat of enforcement is sufficiently imminent" if a plaintiff passes a three-part test. *Id.* Plaintiffs ace each part.

First, Sacred Heart intends to engage in activities "arguably affected with a constitutional interest." *Id.* Michigan "concede[s]" this. *Id.*

Second, ELCRA at least "arguably proscribe[s]" Sacred Heart's activities. *Id.* at 843–48. Michigan does not dispute that, without an exception, ELCRA forbids Sacred Heart's policies regarding housing, pronouns, athletics, restrooms, and uniforms. *See* ECF No. 98, PageID.2712. But for the first time, Michigan argues that Plaintiffs lack standing to challenge the Education Clauses because it "has not alleged that it refuses to admit students based on sexual orientation or gender identity," and "would decline admission only where students refuse to abide by the Catholic faith." ECF No. 98, PageID.2712. That's wrong. While Sacred Heart is willing to consider any student, it will not admit—and will not retain—any student who violates its conduct policies by engaging in homosexual activity or identifying as transgender. ECF No. 1, PageID.33-35 (Sacred Heart "does not admit" or "allow" students whose adopt sexual identities that conflict with the Catholic faith and its doctrine and screens students for compliance before admission); *see* ECF No. 88-1, PageID.2186-2187 (same). Michigan admits that ELCRA forbids Sacred Heart's admission policy. ECF No. 88-1, PageID.2056; *see id.* PageID.2054 (ELCRA prohibits any act to "exclude, expel, limit, or otherwise discriminate").

On Sacred Heart's other policies, Michigan points to ELCRA's discretionary exemptions in a lukewarm attempt to contest standing. ECF No. 98, PageID.2720-2722 (referencing "securing civil rights guaranteed by law" and the BFOQ process); *id.* at PageID.2746 (referencing "permitted by law" exemptions). But these exemptions are not "so clear that [they] render" ELCRA "obviously inapplicable to" Sacred Heart's conduct. *See CHC*, 117 F.4th at 847 (discussing similar conduct for Christian Healthcare Centers in a consolidated opinion). After all, Michigan admits that it is "a violation of ELCRA" for Sacred Heart to enforce and publish its employment, pronoun, and educational policies. Londo Dep. Tr., PageID.2054-2060, 2063, 2065; Trevino Dep. Tr., PageID.1966-1968.

Michigan's only proposed exemption is the First Amendment. But Sacred Heart is not deprived of standing if the First Amendment protects its activities. That's the point of this case; for the court to rule that it does. If it were as Michigan claims, all successful pre-enforcement actions alleging First Amendment violations would end with a dismissal for lack of standing rather than a favorable judgment. And that result would invert the rule that courts accept "the merits" of a claim as "valid" for standing purposes. *Kentucky v. Yellen*, 54 F.4th 325, 349 n.16 (6th Cir. 2022) (citation modified).

Third, Sacred Heart faces a credible threat of enforcement. *CHC*, 117 F.4th at 848–54. Michigan actively investigates and prosecutes ELCRA violations, *id.* at 848–49; ECF No. 93, PageID.2658-2660, including against religious employers, businesses, and schools. *See, e.g.*, Lakeview Public Schools Case File, ECF No. 88-4, PageID.2587-2588. Next, any aggrieved "person"—which Michigan defines as practically anyone—may file a complaint. *CHC*, 117 F.4th at 850; *see also* ECF No. 93, PageID.2659 (listing examples). And Michigan did not disavow enforcement when Sacred Heart sued. *CHC*, 117 F.4th at 850–51. Finally, the investigation process is burdensome and penalties are severe. ECF No. 93, PageID.2659-2660 (listing penalties); *Cath. Charities of Jackson, Lenawee, & Hillsdale Ctys. v. Whitmer*, 162 F.4th 686, 691 (6th Cir. 2025) (considering penalties in standing analysis). To avoid those penalties, Sacred Heart "chilled" its "speech" before the stipulated injunction. *See CHC*, 117 F.4th at 848; Supp. Floyd Decl., ECF No. 29-2, ¶¶18, 32–35, PageID.565, 567-568.

Despite this evidence, Michigan suggests Sacred Heart lacks standing to challenge the Accommodation and Education Clauses. ECF No. 98, PageID.2740, 2752. That suggestion ignores Michigan's admission that Sacred Heart's policies violate ELCRA. Londo Dep. Tr., ECF No. 88-1, PageID.2056 (admitting that Sacred Heart violates ELCRA by refusing to admit students who identify as transgender or

engage in homosexual activity, enforcing conduct policies on sexual orientation and gender identity, and maintaining sex-separated facilities and activities); *id.* PageID.2059 (admitting that Sacred Heart's job posting violates the Employment Publication Clause); *id.* Page.ID.2021-2022 (documents stating sex-separated facilities violate Public Accommodation Publication Clause). The Unwelcome Clause's terms are also so vague that anyone could file a complaint based on *any portion* of the school's statements.

B. Michigan causes Plaintiffs' injuries, and a favorable court order redresses them.

Michigan causes Plaintiffs' injuries, which a decision in their favor would redress. Causation and redressability are "flip sides of the same coin." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (citation modified). "If a defendant's action causes an injury, enjoining the action … will typically redress that injury." *Id*. Michigan only contests these elements as applied to the Attorney General. But Plaintiffs proved these elements against her.

Michigan says the Attorney General does not cause Plaintiffs' injuries because she has "no independent authority to initiate enforcement actions." ECF No. 98, PageID.2718. Michigan continues that an injunction against her would not redress Sacred Heart's injuries. *Id*. In support, Michigan cites four cases. *Id.* Each case held that a suit against an Attorney General could not rest on the office's general authority to enforce a law. But those cases aren't like this one. Michigan's Attorney General "has statutory authority to" launch complaints and enforce ELCRA. *Yoder v. Bowen*, 146 F.4th 516, 526 (6th Cir. 2025).

For example, the Attorney General can file complaints with the Division as an aggrieved "person"—defined to include any "political subdivision or agency," MDCR Rule 37.2(p), and "public official[s]." ECF No. 88-1, PageID.1806. That is enough for standing. If an official can "cause" an "injury by filing the charges,"

causation and redressability are met. *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1034 (6th Cir. 2022) (distinguishing Attorney General from district attorney because only the latter could "initiate" proceedings); *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (holding standing elements met when Attorney General could "institute a civil complaint").

The Attorney General's other "'limited'" enforcement authority confirms that conclusion. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1175 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023) (affirming standing). She represents the Department and the Commission in administrative hearings and enforces compliance with the Department's and the Commission's orders. ECF No. 83, PageID.1441; ECF No. 88-1, PageID.2016, 2025.

This authority gives the Attorney General "some connection" with ELCRA's "enforcement." *Ex Parte Young*, 209 U.S. 123, 157–58 (1908) (distinguishing *Fitts v. McGhee*, 172 U.S. 516 (1899) because the "officers" there had "no duty at all with regard to the act"). For that reason, standing here doesn't depend on the Attorney General's "representation alone." ECF No. 98, PageID.2719. There's a difference between the Attorney General's authority to "defend the constitutionality of the statute," and her authority to "prosecute plaintiffs under it." *Nabors*, 35 F.4th at 1032. Michigan's Attorney General's authority falls into the latter category. An injunction preventing her from filing a complaint, prosecuting the complaint in court, or enforcing orders against the ministry will "relieve a discrete injury" even if not the ministry's "*every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

II. No aspect of Plaintiffs' case is moot because Michigan has not irrevocably eradicated the effects of the violation.

Plaintiffs need a court-ordered remedy to protect their rights because they had standing "at the time" they filed "the complaint" and face ongoing enforcement threats. *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 525 (6th Cir.

2001). Michigan downplays these risks regarding the school's Art Teacher positions and pronoun and educational policies by retreating to the "permitted by law" exemption. *See* ECF No. 98, PageID.2712, 2720, 2727, 2746, 2750. Michigan never mentions the doctrine by name, but Michigan's retreat is a disguised mootness argument. But the ministry's claims are not moot. Michigan has not made it "absolutely clear" that the State will not "return to" its "old ways" after this litigation. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation modified).

Because the ministry had standing when it filed suit, this Court's ongoing Article III jurisdiction case shifts to mootness. *See West Virginia*, 597 U.S. at 718–19. An "intervening circumstance arising *after* a suit has been filed" can sometimes moot a case. *Yellen*, 54 F.4th at 340 (citation modified). And even a defendant's voluntary cessation rarely moots a case: "voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth*, 528 U.S. at 174 (citation modified). A defendant relying on voluntary cessation bears a "heavy," "formidable," and "stringent" burden to show mootness. *Id.* at 189–90. "Nothing" Michigan "offers here satisfies that formidable standard." *FBI v. Fikre*, 601 U.S. 234, 241, 243 (2024) (holding "governmental defendants" to the same standard as "private ones").

The Employment Clauses certainly apply to Sacred Heart's Athletic Coach and Sexton positions. ECF No. 98, PageID.2730. And without an exemption, the Employment Clause applies to Sacred Heart's Art Teacher position. *See CHC*, 117 F.4th at 855. And, absent an exemption, the Employment and Accommodation Clauses prohibit Sacred Heart's pronoun and educational policies. Londo Dep. Tr., ECF No. 2056-2057. Michigan relies on written discovery responses to suggest that an exemption applies and that enforcement is unlikely. *See* ECF No. 98, PageID.2729-2730.

But those responses cannot moot these issues. First, saying that enforcement is "unlikely" changes nothing. Michigan's decisions were made through "ad hoc, discretionary, and easily reversible actions." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). And "the totality of the circumstances surrounding the" supposed "voluntary cessation" do not "inspire confidence in [its] assurances regarding the likelihood of recurrence." *Id.* at 768–69.

A. Michigan followed no official process to formalize its litigation position, which leaves the ministry at risk.

During the initial proceedings before this Court and the standing-related appeal to the Sixth Circuit, Michigan never disavowed enforcement regarding any of Sacred Heart's positions or its pronoun or educational policies. Then, on remand, Michigan refused to take any position in written discovery on these matters. ECF No. 88-2, PageID.2347-2349, 2358. Michigan finally said that Sacred Heart would not violate the Employment Clause by filling its Art Teacher position with people who share its faith. *Id.* at PageID.2365. Meanwhile, Michigan said that ELCRA prohibits Sacred Heart from enforcing its religious hiring policies for non-ministerial positions, like the Athletic Coach and Sexton. *Id.* at PageID.2366-2367, 2374-2375. Those responses came more than two and a half years after Sacred Heart filed its complaint and relied exclusively on the complaint's allegations and exhibits. Meanwhile, Michigan confirmed that Sacred Heart violates ELCRA through its pronoun policy and employment policies as applied to Athletic Coach and Sexton positions. *Id.* at PageID.2367-2370.

There are at least two takeaways. *First*, Michigan knew enough about the Art Teacher position and the school's pronoun and educational policies to disavow enforcement the day Plaintiffs filed suit. Instead, Michigan waited several years before taking any position on these issues. The "timing" of Michigan's multi-year delay in providing any guidance "raises suspicions that its cessation is not genuine"

because the State had all the relevant information years ago. *Speech First, Inc.*, 939 F.3d at 769.

Second, Michigan officials can flip their position again without a formal process—and they have. "A future administration could rescind" Michigan's responses "just as easily as this administration established" them. *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 441 (6th Cir. 2022). As proof, the Commission is always free to "change its mind." ECF No. 88-1, PageID.2092. And decisions by the Commission or individual Commissioners do not bind future Commissions. *Id.* at PageID.2020, 2092. As Michigan stated in an interrogatory response, "the individuals sued in their official capacity are not authorized to speak on behalf of the [Commission] in the absence of an official position taken by the" Commission. ECF No. 88-2, PageID.2357-2358.

But Michigan did not follow any "formal processes" to adopt its views here. *Speech First, Inc.*, 939 F.3d at 768. Its views on Sacred Heart Art Teacher position and pronoun and educational policies came from "ad hoc, discretionary, and easily reversible actions." *Id.* So neither the Department, the Commission, nor the Attorney General has taken a formal, official, irreversible position on these matters that would bind their successors.

For example, the Department's Director of Enforcement was "not involved" in formulating the Department's supplemental discovery responses, ECF No. 88-1, PageID.2071, even though the Department's Director consistently defers to the "enforcement division," to make decisions, *id.* at 1666, 1691. Likewise, the Commission confirmed that it had not followed "any of" its "formal mechanisms to approve" its discovery responses "in a meeting or anything like that." *Id.* at 2092. Instead, the Commission's litigation counsel drafted the responses and sent them to the individual Commissioners to approve. *Id.* at 2093-2094. To complete those responses, Commissioners did not review internal policies, meet as a body, or

discuss their responses with others. *Id.* They each just approved the responses based on their individual judgment. *Id.* Parties are expected to consult with counsel in discovery. But Michigan's complete dependence on that advice here, outside the agencies' normal, official decision-making process, proves Michigan did not follow "legislative-like procedures" to adopt its current position. *Speech First, Inc.*, 939 F.3d at 768. *See Harrell v. The Florida Bar*, 608 F.3d 1241, 1267 (11th Cir. 2010) (no mootness when state board "departed from its own procedures" and changed course "at the urging of [its] counsel").

Michigan has no intention of doing so. The Commission does not plan to adopt a formal statement on pronouns or educational policies related to gender transitions. ECF No. 88-1, PageID.2101. Without an official endorsement of non-enforcement, *cf. Yellen*, 54 F.4th at 341 (mootness from a final rule after "the notice-and-comment process"), Michigan has not "completely and irrevocably eradicated the effects of the alleged violation," *Speech First, Inc.*, 939 F.3d at 767 (citation modified). So Michigan's application of ELCRA to Sacred Heart's ministerial positions and its pronoun and educational policies remain active conflicts in need of a court-ordered resolution.

B. The totality of the circumstances disproves mootness.

The "totality of the circumstances" here also forecloses mootness. *Id.* at 768–69. For starters, Michigan invokes the First Amendment to justify a "permitted by law" exception. But Michigan routinely prosecutes other faith-based businesses raising First Amendment defenses to ELCRA's application. *CHC*, 117 F.4th at 848 (noting "religious exercise" defenses are "not always successful" against ELCRA). And in an *ongoing* enforcement action against a business owner who raised First Amendment defenses, the Department and the Commission's ALJ argued that "the Commission does not have authority to adjudicate constitutional challenges." ECF

No. 88-1, PageID.1996-1997. Plaintiffs have a "personal stake" in avoiding years of administrative proceedings where constitutional rights may be ignored—and this Court has the authority to issue an injunction to prevent that from happening. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016).

What's more, other undisputed facts specific to Sacred Heart's employment, pronoun, and educational policies show Michigan has not met its mootness burden.

Employment. Michigan teeter-tottered on employment issues throughout this litigation. During one deposition, a Commissioner reversed himself about whether the ministerial exception covers a Sexton. ECF No. 88-1, PageID.2063, 2065. That shows how easy it is for Michigan to be blown off course. Without an injunction, nothing stops Michigan from changing its positions.

Pronouns. As defendants testified, Sacred Heart's pronoun policies violate the Accommodation and Education Clauses. ECF No. 88-1, PageID.2036-2037, 2056. After years of litigation, the Commission decided the week of deposition to claim disavowing enforcement on pronouns. *Id.* at PageID.2064-2066. But Michigan's discretionary pivot does not moot this claim because it does not eliminate Plaintiffs' risk of harm.

After all, Michigan is currently prosecuting a business owner for an online post stating that she would not "play the pronoun game" and that she would deny requests "to have a particular pronoun used." *Id.* at PageID.1708-1709. The Department's Director said the case "has absolutely nothing to do with our First Amendment rights." *Id.* at PageID.1700-1701. And when the owner raised the First Amendment during the enforcement proceedings, the Department and the Commission's ALJ concluded they had no jurisdiction to consider that defense. *Id.* at PageID.1861. With this ongoing prosecution of pronoun usage contrary to a First Amendment defense, Michigan's discovery responses here are cold comfort.

These hedges are not the "well-reasoned justification[s]" courts expect for mootness. *Harrell*, 608 F.3d at 1266. They leave the door ajar for contrary future conclusions. ECF No. 88-1, PageID.2092 (Commission agreeing "[n]othing would prevent a new group of commissioners from … read[ing] this body of law differently"). Adding to the uncertainty, Michigan still asserts a "compelling interest" in forcing pronoun usage inconsistent with sex, which gives it wiggle room to later claim that the Education and Accommodation Clauses satisfy strict scrutiny and overcome any First Amendment interests. *Id.* at PageID.1734-1736, 1983, 2036-2039.

Educational Policies. Michigan admitted that Sacred Heart violates ELCRA by refusing to admit or retain students who identify as transgender or engage in homosexual activity. *Id.* at PageID.2056-2057. It also said Sacred Heart violates ELCRA by separating students by biological sex in its facilities, activities, and uniforms. *Id.* Michigan said it had a "compelling interest" in preventing gender-identity discrimination. *Id.* at PageID.2036. But after years of litigation, and just days before deposition, Michigan suddenly decided to claim disavowing enforcement of the Employment Clause. *Id.* at PageID.2064. The reason? The "advice of counsel." *Id.* at PageID. 2098, 2104, 2107. That was it. There had been no change in the relevant law or in the facts since the ministry filed suit in 2022. *See id.* Indeed, Michigan still thinks it has a "legitimate, if not compelling, interest" in enforcing the Employment Clause. ECF No. 98, PageID.2749. And Michigan still admits that Sacred Heart violates the law if it publishes its policies. ECF No. 88-1, PageID.2059.

Michigan's shift—based solely on changed advice of counsel—cannot moot this issue. Exclusive reliance on the advice of counsel outside Michigan's formal process gives no assurance that the State will not renew its prior position after this litigation. *See Speech First, Inc.*, 939 F.3d at 767. Nor has the reliance "completely

and irrevocably eradicated the effects of the violation." *Id.* A permanent injunction preventing Michigan from backsliding would resolve the issue. So this issue is not moot because it is not "impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (citation modified).

And this isn't an issue of first impression. In 2019, Michigan investigated a hair-removal business for declining to participate in a gender transition. ECF No. 88-4, PageID.2546. The business owner explained that she declined to provide hair-removal services for a man identifying as a woman because "[u]nder her sincerely held religious beliefs, assisting in the 'transition' process in any way … would cause her to directly violate her faith and conscience." *Id.* Michigan told the complainant that the "case may go to the Supreme Court due to the religious aspects of the case," but pursued the case anyway. *Id.* at PageID.2542. Michigan prosecuted the case until the business went "out of business." *Id.* at 2532. There is little daylight between the relevant parts of that case and this one.

Based on its enforcement history, Michigan's convenient change-of-heart at the litigation's twilight cannot moot this issue. Without a court-ordered remedy, Michigan could always reinterpret the case law, change its mind, and enforce the Education and Accommodation Clauses against the ministry later. Sacred Heart's Art Teacher position and its policies on pronouns and education are not moot. Michigan can always change its mind about enforcement. Nothing it has done here binds future Commissions. Michigan has shunned formal processes. And Michigan's reasons for potential non-enforcement do not "inspire confidence" that the State will not reverse course again later especially given its enforcement history. *Speech First, Inc.*, 939 F.3d at 768–69. That leaves Sacred Heart with the same credible threat of enforcement it faced when it sued. A court-ordered injunction resolves that threat.

III. The Employment Clause violates the First Amendment by forcing Sacred Heart to hire employees who disagree with its beliefs.

The Employment Clause forces Sacred Heart to employ individuals who do not share its religious beliefs. ECF No. 83, PageID.1452-1456. This requirement violates Sacred Heart's rights to religious autonomy, religious exercise, expressive association, and assembly. The Employment Publication Clause also bans Sacred Heart from publishing job descriptions outlining its beliefs. ECF No. 88-1, PageID.2059. Michigan does not dispute Sacred Heart's claim that the Employment Publication Clause restricts its speech based on content and viewpoint. *See* ECF No. 98, PageID.2750-2754. So if the school has a right to hire employees who agree with its beliefs (and it does), it has a right to publish materials explaining that expectation. *See 303 Creative LLC*, 600 U.S. at 581 n.1, 598 n.5 (adopting this logic).

A. The Employment Clause infringes religious autonomy.

The parties agree that Sacred Heart has a right to religious autonomy, but Michigan says that right covers only ministerial employees. ECF No. 98, PageID.2722-2723. That's wrong.

The religious autonomy doctrine protects Sacred Heart's employment decisions over ministerial *and* non-ministerial roles. *See Union Gospel Mission of Yakima v. Brown*, 162 F.4th 1190, 1197 (9th Cir. Jan. 6, 2026) ("the church autonomy doctrine protects the decision to hire co-religionists for non-ministerial roles if that decision is based on the organization's sincerely held religious beliefs"); ECF No. 93, PageID.2663-2665. Because the parties dispute the First Amendment's scope, Michigan is wrong to claim that ELCRA "accommodates Sacred Heart's religious hiring practices." ECF No. 98, PageID.2727. Those statements assume that Michigan is right about the First Amendment. But that's the conflict. Michigan cannot escape that conflict with a "circular" argument saying that ELCRA "does not prohibit [Sacred Heart's] hiring practices" because ELCRA "does not affect

ministerial employees." *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 60 (9th Cir. 2024). Sacred Heart applies its policies to ministerial and non-ministerial employees. The religious autonomy doctrine protects that decision. And Michigan's burden on that decision is per se unconstitutional. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (holding that religious autonomy "bars" governmental action rather than merely triggering strict scrutiny).

1. The ministerial exception protects Sacred Heart's employment decisions for its ministerial employees.

Michigan concedes that the Art Teacher is protected by the ministerial exception. ECF No. 98, PageID.2729-2730. But its concessions do not moot the issue, *Supra* § II. For those reasons, the appropriate remedy is a court-ordered injunction stating that the ministerial exception prevents Michigan from applying ELCRA to Sacred Heart's Art Teacher position.

2. The co-religionist doctrine protects Sacred Heart's employment decisions for non-ministerial employees.

The co-religionist doctrine protects Sacred Heart's decisions to hire non-ministerial positions consistent with its faith, including its Athletic Coach and Sexton. *Yakima*, 162 F.4th at 1197–1198. Michigan says the Employment Clause applies to those positions without violating the First Amendment. ECF No. 88-1, PageID.2060, 2065. Michigan tries to distinguish three of Plaintiffs' primary cases. ECF No. 98, PageID.2733-2737. But each case embraced the co-religionist doctrine in principle, if not by name. One Supreme Court case held that the First Amendment prevented Catholic schools from being forced to bargain with "lay teachers." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 493–94 & n.5, 502, 507 (1979). Another Supreme Court case and the Sixth Circuit acknowledged that the co-religionist doctrine animated Title VII's statutory exemption, but had no need to apply the doctrine because of the statutory exemption. *See Corp. of*

Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987) ("We may assume for the sake of argument that the pre–1972 exemption was adequate in the sense that the Free Exercise Clause required no more."); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (Title VII exempted "religious organizations" to recognize "the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions.").

The Ninth Circuit just reaffirmed this principle in *Yakima*. 162 F.4th at 1197–1198. There, Washington had an employment-discrimination law with an exemption for religious employers. *Id.* But the Washington Supreme Court narrowly interpreted the exemption to only protect the hiring of "ministers." *Id.* Afterward, a religious organization claimed the state law violated their First Amendment rights under the co-religionist doctrine as applied to their hiring of non-ministers. *Id.* at 1198–1199.

The Ninth Circuit agreed. The Ninth Circuit reached its conclusion by relying on many cases that Michigan tries to distinguish here. *Id.* at 1201, 1204, 1208, 1209 (citing *Amos*, *Hall*, and *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002)). Relying on those cases, the Ninth Circuit held that the co-religionist doctrine (i) applies to religious organizations; (ii) "protects sincerely held religious beliefs and acts rooted in religious beliefs"; and (iii) applies "to the extent the hiring of co-religionist non-ministerial employees is based on sincerely held religious beliefs." *Id.* at 1205 (citation modified).

Sacred Heart meets this test. Michigan conceded it is a religious school with sincerely held religious beliefs about marriage and sexuality. ECF No. 88-1, 2064. Sacred Heart believes that only employees who share those beliefs can effectively advance its religious mission. *See* ECF No. 93, PageID.2653 (collecting citations). So

Sacred Heart requires all employees to affirm their agreement and commitment by signing an "oath of fidelity." *Id.*

Michigan second-guesses Sacred Heart's need for co-religionists in its Athletic Coach and Sexton, saying it believes non-Christians could fill these positions without impacting Sacred Heart's mission. ECF No. 98, PageID.2739. But this disagreement itself raises "inherently religious questions." *Yakima*, 162 F.4th at 1204. The First Amendment bars Michigan from rewriting Sacred Heart's sincerely held beliefs.

Michigan tries to distinguish *Yakima*, but none of its proposed distinctions work. Michigan starts with a technicality: *Yakima* applied a likelihood of success standard. ECF No. 98, PageID.2735. Michigan never explains why this matters. The material facts here mirror those in *Yakima*. *See* 162 F.4th at 1203–1204 (discussing facts like those here).

Next, Michigan says that Washington's law was unique and unlike "Title VII and most state laws" because it only covered "ministerial employees." ECF No. 98, PageID.2736. That is a resemblance, not a difference. Michigan's law, like Washington's, only covers ministerial employees. Because Michigan, like Washington, "narrowly limit[s]" religious "exemption[s] to ministers," the "church autonomy doctrine protects" Sacred Heart's hiring of co-religionists. *Yakima*, 162 F.4th at 1201.

Accepting the co-religionist doctrine does not "render the ministerial exception nugatory." ECF No.98, PageID.2733. The doctrines "differ[] in some important respects" and serve unique functions. *Yakima*, 162 F.4th at 1205 (explaining the differences). The co-religionist doctrine applies.

B. The Employment Clause lacks general applicability.

The Employment Clause lacks general applicability because it allows individualized exemptions and it treats comparable secular employment decisions more favorably than Sacred Heart's religious employment choices.

1. The clause allows individualized exemptions.

Sacred Heart identified two ways the Employment Clause gave Michigan "sole discretion" to authorize "individualized exemptions," *Fulton v. City of Phila.*, 593 U.S. 522, 533, 537 (2021): (1) the BFOQ process; and (2) secular exemptions. ECF No. 93, PageID.2668-2669.

Michigan does not deny that the cited provisions treat secular activity more favorably. Instead, Michigan says that the secular exemptions do not destroy general applicability because they do not vest the Commission with discretion to choose who is exempt. ECF No. 98, PageID.2726. But the Commission exercised precisely such discretion in suddenly proposing exemptions for Sacred Heart and Christian Healthcare Centers after years of vigorous litigation. And Michigan has "very broad" discretion to decide whether an employer's reason for an adverse action is a "legitimate non-discriminatory" reason. ECF No. 88-1, PageID.1881-1882. This shows the Employment Clause is not generally applicable because Michigan "evaluates whether to grant religious exemptions 'on an individual basis.'" *Dahl v. Bd. of Trs. of W. Michigan Univ.*, 15 F.4th 728, 734 (6th Cir. 2021).

The BFOQ process adds more proof. The Department and a Commissioner explained that they decide BFOQ requests case-by-case after weighing the facts and consulting their own perspectives. ECF No. 88-1, PageID.1889-1890, 2029. The analysis is so subjective that a Commissioner flipped his opinion about the religious functions of the Sexton position during his deposition. *Id.* at PageID.2063, 2065 (first explaining why the Sexton is ministerial, then opining that it is not).

The BFOQ process empowers the Commission with significant discretion. For example, applicants must make "a sufficient showing." MCL § 37.2208. The Commission decides what that means based on what it finds "compelling." ECF No. 88-1, PageID.2029-2030. Commissioners can even "consult their own perspectives." *Id.* The discretionary "sufficient showing" standard sounds eerily similar to "'good cause'"—a "standard" that "permit[s] the government to grant exemptions based on the circumstances underlying each application." *Fulton*, 593 U.S. at 534.

Consider a recent example. Seniors Helping Seniors provides professional in-home care services and companionship for seniors through caretakers who are seniors themselves. Michigan Civil Rights Commission meeting 1/26/2026 1:15:00–40:28, https://bit.ly/4kfj4Ie (last visited Feb. 5, 2026). So Seniors Helping Seniors applied for a limited aged-based BFOQ. During the BFOQ hearing, a commissioner raised concerns well beyond the Commission's and ELCRA's jurisdiction—like whether the company might function as a "dating platform." *Id.* 1:30:50–31:38. Another Commissioner inquired about race discrimination—a category that was irrelevant to the requested BFOQ—based on her personal background of "having served on various healthcare organization boards." *Id.* 1:35:38–36:48. Based on these subjective concerns, the Commission denied the request.

Finally, Michigan defends its BFOQ framework by citing *Ohio C.R. Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986). That case is irrelevant. It deals with abstention; a religious school tried to stop an ongoing state investigation by filing a federal lawsuit challenging the investigation itself. *Id.* at 624–29. But there are no abstention issues here. That case also held the school could not challenge the investigation but saved "the merits" for a later day. *Id.* at 624, 628. But Sacred Heart challenges the Employment Clause itself, not Michigan's investigative authority. And on the merits, the Employment Clause violates the school's First Amendment rights.

2. The Clauses treat comparable secular employment activities better than Sacred Heart's religious employment activities.

Michigan never confronts Sacred Heart's claim that the Employment Clause fails general applicability by treating comparable secular employment activities better than the ministry's religious employment activities.

Comparability turns on the government's asserted interests in regulating the at-issue religious activities, and whether the government exempts secular activities that undermine those interests. *Tandon v. Newsom*, 593 U.S. 61, 63 (2021). Michigan claims an interest in "eradicating employment discrimination based on protected characteristics." ECF No. 98, PageID.2724. But Michigan allows sports leagues, schools, landlords, and private clubs to discriminate. ECF No. 93, PageID.2668-2669 (collecting examples).

The secular exemptions are comparable because they would be illegal status-based discrimination absent an exemption. For that reason, the exemptions undermine Michigan's asserted interests. Michigan has no evidence that a similar exemption for Sacred Heart Athletic Coach and Sexton positions would disturb its interests more than the secular exemptions. So the Employment Clause lacks general applicability.

IV. Michigan's law co-opts Sacred Heart's expressive association.

The Employment and Employment Publication Clauses burden Sacred Heart's right to expressive association. The right of expressive association protects Sacred Heart's employment decisions because hiring employees who disagree with its beliefs would significantly burden its expression.

Michigan says the "Supreme Court has rejected" expressive association claims "in the employment context." ECF No. 98, PageID.2738. That's incorrect. Sixty years ago, the Supreme Court held that "the activities of" an expressive

association's "staff" are "modes of expression and association" protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428–429 (1963). Michigan claims two cases support the opposite conclusion. But neither are so broad or overruled *Button*.

The first case dealt with student groups—not employers. *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 682 (2010). The second case, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), did not categorically exclude employers from expressive-association protection. It just held that a for-profit law firm hadn't shown that extending partnership to a woman would "inhibit[]" expression of its "ideas and beliefs." *Id.* at 78. If the expressive-association analysis didn't apply to employers at all, it would have been unnecessary for the Supreme Court to consider the relevant elements, including the burden on the firm's expression.

Shifting gears, Michigan claims that *Dale* distinguished between "membership" and employment. ECF No. 98, PageID.2739. Not so. The Supreme Court addressed membership because the Boy Scouts revoked the plaintiff's "adult membership." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000). But the thrust of the opinion protected expressive associations from governments' attempts to coerce groups "to accept" those who "may impair" their "ability" to "express [their] views." *Id.* at 648. An adverse employee would have burdened the Boy Scouts' views just as much as or more than a volunteer leader. The Boy Scouts' own policies said so. *Id.* at 672 (Stevens, J., dissenting) ("It is [the Boy Scouts'] position, however, that homosexuality and *professional or non-professional employment* in Scouting are not appropriate." (emphasis added)).

Since *Dale*, many courts, including this one, have protected employers from being coerced to join with employees to speak. *See CompassCare v. Hochul*, 125 F.4th 49, 62 (2d Cir. 2025) (applying expressive association right to "specific employment decisions"); *Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023) (similar); *Bethany Christian Servs. v. Corbin*, No. 1:24-cv-922 (W.D. Mich. June 20,

2025), ECF No. 52, PageID.949 (holding religious organization pled plausible expressive-association claim when challenged contract clause required "it to employ—and therefore associate—with" employees with contrary religious beliefs); *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 822 (E.D. Mo. 2018).[1]

On the merits of the *Dale* test, Michigan does not dispute that Sacred Heart "engage[s] in some form of expression." *Dale*, 530 U.S. at 648. But Michigan disagrees that hiring "a non-Christian" in some positions "would burden" the ministry's expression. ECF No. 98, PageID.2739. Michigan's disagreement fails to "give deference to" the school's "view of what would impair its expression." *Dale*, 530 U.S. at 653. All along, Sacred Heart has been clear that it requires its employees to share its beliefs, and that employing those who contradict its beliefs on marriage and sexuality would undermine Sacred Heart's mission. VC, ECF No. 1, PageID.13.

Michigan suggests that the ministry could hire people who disagree with its religious beliefs because they could still "provide a Catholic education consistent with its religious mission." ECF No. 98, PageID.2739. Michigan fundamentally misunderstands Sacred Heart's expression, and it shows. Following Michigan's suggestion would violate the school's faith.

Michigan ends with a flood-gates argument. It says that accepting the expressive-association claim would "hamstring [Defendant]s' ability to ensure equal employment opportunities." *Id.* at PageID.2740. Michigan has no evidence for this assertion. Not every employer is protected—only those who meet the *Dale* test. That test is well-suited to separate the expressive wheat from the discriminatory chaff. It

[1] These cases track other decisions holding that different First Amendment rights override Title VII when it infringes on those rights. *See Moore v. Hadestown Broadway Ltd. Liab. Co.*, 722 F. Supp. 3d 229, 242, 259–63 (S.D.N.Y. 2024) (holding Title VII and other anti-discrimination laws violated a production company's free speech rights when applied to regulate the company's casting decisions). Expressive association should not be relegated to a second-class First Amendment freedom.

ensures that employers whose speech is not affected have no protection, *Hishon*, 467 U.S. at 78, and safeguards the freedom of expressive employers to persuasively speak their messages, *Slattery*, 61 F.4th at 287.

V. The Education Clauses force Sacred Heart to violate its faith.

Michigan asserts two arguments to defend the Education Clauses, but both fall flat. To begin, Michigan argues that Sacred Heart lacks standing to challenge the Clauses as to its admission policies. ECF No. 98, PageID.2752. But as explained above, that's wrong because Sacred Heart *does* screen prospective students and limits admission based on students' compliance with its beliefs about sexual orientation, gender identity, and gender expression. *See supra*, Section I.A.

Next, Michigan suggests that Sacred Heart's school policies related to pronouns, sexual conduct and morality, restrooms, uniforms, and sports teams are all covered by "§ 403's [religious] exception from § 402's discrimination provisions." ECF No. 98, PageID.2752. They're not. Michigan already admitted that Section 402 flatly prohibits Sacred Heart's policies. ECF No. 88-1, PageID.2056-2057. And while Section 403 exempts "the provisions of section 402 related to religion" for religious educational institutions, the provisions of section 402 related to sexual orientation and gender identity still apply. *See* MCL § 37.2403.

Finally, after years of litigation, and after admitting that ELCRA facially prohibits Sacred Heart's policies, Michigan agrees that the religious autonomy doctrine permits Sacred Heart to enforce policies based on its faith. ECF No. 98, PageID.2750-2752. Michigan uses its admission to suggest that Sacred Heart's claims are now moot. *See id.* As explained above, Michigan's eleventh-hour reversal cannot moot Sacred Heart's claims or deprive it of standing. *Supra* Section I. And even now, Michigan hedges its position, reiterating that Sacred Heart is not immune from secular laws and that Sacred Heart would "likely" violate the law by

denying a homosexual student access to school facilities. ECF No. 98, PageID.2751. Sacred Heart requires a definitive declaration and injunction to protect its constitutional rights.

VI. The Accommodation Clause violates the First Amendment by forcing Sacred Heart to contradict its beliefs.

The Accommodation Clause also forces Sacred Heart to offer educational services and to use pronouns that contradict its faith. The Accommodation Publication Clause also bans Sacred Heart from explaining its educational and pronoun policies to the public based on the policies' content and viewpoint. *See* ECF No. 93, PageID.2669-2673. Michigan does not contest the merits of the latter point. And because the ministry has a right to enforce religious educational policies and refuse pronoun usage that conflicts with its beliefs, it has a right to post materials explaining its decision to refuse those activities. *See 303 Creative LLC*, 600 U.S. at 581 n.1, 598 n.5 (noting that comparable clauses stood or fell together).

A. Michigan considers Sacred Heart a place of public accommodation, so it reasonably fears enforcement.

Defendants say that Sacred Heart lacks standing to challenge the Public Accommodation Clauses because it hasn't shown it is a public accommodation and because it is also regulated by other articles of the Act (Article 2 for employment and Article 4 for educational institutions). Both arguments fail.

First, in written discovery responses, Defendants *admitted* that they consider Sacred Heart "a 'place of public accommodation' subject to Michigan's Elliot-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.101 *et seq*." Defs.' Suppl. Resps. to Pls.' First Set of RFA, No. 1, ECF No. 88-2, PageID.2365. A matter admitted under Rule 36 is "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b). "Admissions obtained by use of Rule 36 may show that there is no genuine issue as to any material fact

and justify the entry of summary judgment under Rule 56." Charles Alan Wright & Arthur R. Miller, 8B Fed. Prac. & Proc. Civ. § 2264 (3d ed. 2026). Michigan confirmed that Sacred Heart is a public accommodation in depositions. ECF No. 88-1, PageID.2059; *see id.* at 1714 (agreeing that "a place of public accommodation is nearly anyone who is providing services to the public for a fee"). Defendants' admission is conclusive.

Trying to avoid this admission after the fact, Defendants concede that they "admitted *generally* that Sacred Heart may be a place of public accommodation," but that their broad admission did not specify which particular services or activities rendered Sacred Heart a public accommodation. ECF No. 98, PageID.2742 (emphasis added). That's irrelevant. Represented by counsel, Defendants unambiguously admitted that they consider Sacred Heart a place of public accommodation. Defendants could have qualified their initial response or filed a motion to withdraw their admission, but they did neither. Thus, Defendants cannot now qualify or withdraw their answer in response to Plaintiffs' motion for summary judgment. *See* Charles Alan Wright & Arthur R. Miller, 8B Fed. Prac. & Proc. Civ. § 2264 (citing *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1303 (10th Cir. 2009)).

Second, nothing prevents Defendants from investigating Sacred Heart as a public accommodation simply because it is also subject to other articles of the Act. An entity may be subject to multiple provisions within a statutory scheme when its characteristics satisfy the statutory definitions for each provision. *See, e.g., Post v. Trinity Health-Michigan*, 44 F.4th 572 (6th Cir. 2022). Indeed, Defendants readily acknowledge that multiple articles of the Act apply to Sacred Heart simultaneously. ECF No. 98, PageID.2742. Defendants already admitted that they believe Sacred Heart meets the statutory definition of a place of public accommodation. And Defendants routinely investigate educational institutions for charges of public accommodation discrimination. *See* Lakeview Public Schools Case File, ECF No. 88-

4, PageID.2587-2588 (investigating a school for not changing the name and sex of a transgender student's transcript). Indeed, *just since this motion has been pending*, Defendants have begun investigating a religious school for public accommodation discrimination. *See* Peace Lutheran Church and School Complaint, **attached as Exhibit A**.

Thus, Defendants consider Sacred Heart a place of public accommodation that cannot deny (or publish any statement suggesting it will deny) any "services, facilities, advantages, or accommodations" because of an individual's religion, sex, sexual orientation, or gender identity or expression. MCL § 37.2302. To be sure, Sacred Heart has faith-based policies.

B. The Accommodation Clause is not generally applicable.

Sacred Heart is also entitled to an injunction enjoining Michigan from enforcing the Accommodation Clause because it is not generally applicable. That clause lacks general applicability because it allows individualized exemptions and treats comparable secular activities better than Sacred Heart's religious activities.

1. The clause allows individualized exemptions.

Michigan claims the Accommodation Clause does not authorize individualized exemptions because it is governed by law, not discretion. ECF No. 98, PageID.2724. The undisputed facts tell a different story. The Department takes a case-by-case approach to exempt public accommodations from providing a service if they have a "legitimate non-discriminatory reason." ECF No. 88-2, PageID.2394; ECF No. 88-4, PageID.2562. That reason "could be anything"—not just the law. ECF No. 88-1, PageID.1871-1872. And the Department "has discretion to consider all the circumstances" before deciding whether a reason is legitimate and non-discriminatory. *Id.*

The Commission is similar. It exempts public accommodations "on a case by case basis" after "analyz[ing] the totality of the situation." *Id.* at PageID.2038. Even then, the Commission's conclusions are not set in stone. Future Commissioners may change the Commission's mind to reach a different decision and to read a body of law differently. *Id.* at PageID.2091-2092.

All told, the Accommodations Clause models "a system of individual exemptions" by "invit[ing]" Michigan to consider "the particular circumstances behind" a public accommodations' service denial. *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990) (summarizing Supreme Court precedent).

2. The clause treats comparable secular conduct better than the ministry's religious activities.

Michigan also treats secular actors better than Sacred Heart. But the Accommodation Clause is not generally applicable because it "fail[s] to prohibit nonreligious conduct that endangers" the State's asserted interests. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 543 (1993).

For example, Michigan allows sports leagues, single-sex schools, and some landlords to discriminate based on sex and gender identity. ECF No. 93 PageID.2668 (listing examples). Employers can discriminate with a BFOQ. MCL § 37.2208. And Michigan allows "private clubs" to discriminate, including country, golf, boating, and athletic clubs, and the Elks Lodge. MCL § 37.2301. These examples resemble Sacred Heart's pronoun and educational activities because they exempt otherwise discriminatory conduct. The Accommodation Clause is not generally applicable.

VII. Michigan's law fails strict scrutiny as applied to Plaintiffs.

Michigan does not dispute that its law is per se unconstitutional if it invades Sacred Heart's religious autonomy or regulates its speech based on content and

viewpoint. Because Michigan's law applies in these ways, it is per se unconstitutional. *Supra* §§ III.A, IV.B, V.A.

Applied to Sacred Heart's other First Amendment rights, Michigan cannot satisfy any level of heightened scrutiny because it offers no evidence to justify its interest in applying its laws to Sacred Heart's employment, pronoun, and educational policies.

Michigan claims it has a "compelling interest in eradicating discrimination." ECF No. 98, PageID.2724, 2749. But this interest is too "broadly formulated" to satisfy strict scrutiny. *Fulton*, 593 U.S. at 541 (citation modified). And Michigan didn't present any "evidence" to support its broad assertions. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 800 (2011).

Michigan barely contests narrow tailoring. Michigan never refuted any of the ministry's alternatives to compelling pronoun usage or educational policies, *see* ECF No. 93, PageID.2683-2684, even though the State had to show that those alternatives "would fail" to advance its interests. *McCullen v. Coakley*, 573 U.S. 464, 494–95 (2014). Michigan mentions narrow tailoring in one sentence in the context of the Employment Clause. ECF No. 98, PageID.2724. It then says those exemptions "exceed" Title VII. *Id.* But the examples prove Michigan's lack of narrow tailoring. Title VII exempts religious organizations; Michigan doesn't. *See* 42 U.S.C. § 2000e-1(a). And Michigan offered no reason why it could not exempt Sacred Heart's employment practices like it exempts educational institutions and other employment decisions.

VIII. The Unwelcome Clause facially violates the First and Fourteenth Amendments because it is vague and overbroad and allows unbridled discretion.

The words "objectionable, unwelcome, unacceptable, or undesirable" render the Unwelcome Clause facially vague and overbroad and grant Michigan officials unbridled enforcement discretion.

Vagueness and unbridled discretion. Michigan tries to clarify the definitions of "objectionable, unwelcome, unacceptable, or undesirable" with Merriam-Webster's dictionary definitions. ECF No. 98, PageID.2744-2745. But Michigan has no guidance on how to interpret these words. ECF No. 88-1, PageID.2034. So there is no certainty that Merriam-Webster's definitions apply. In the end, Michigan's argument compounds the Unwelcome Clause's vagueness: the words themselves are vague *and* enforcement officials have no objective standards on where to look to define the words.

Michigan's attempt at clarity adds layers of confusion. Michigan mentions "offensive," "not pleasing," and other synonyms. ECF No. 98, PageID.2744-2745. But courts have struck down those words as vague and overly discretionary. *See United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) (holding "'aesthetically pleasing'" invited "arbitrary or discriminatory enforcement"); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–26 (W.D. Mich. 2014) (similar for "offensive"); *People for Ethical Treatment of Animals, Inc. v. Shore Transit*, 580 F. Supp. 3d 183, 193–95, 198 (D. Md. 2022) (similar for "offensive, objectionable, or in poor taste"). Vague definitions cannot clear up vague words.

Overbreadth. Michigan says the Accommodation Publication Clause is not overbroad because it prohibits statements that "services will be" (i) "denied" or (ii) "provided unequally." ECF No. 98, PageID.2747. That is true of the *Denial Clause*, not the *Unwelcome Clause*. The Denial Clause bans statements indicating that the

"full and equal enjoyment" of services ("provided unequally" part) "will be refused, withheld," or "denied" ("denied" part) because of a protected trait. MCL § 37.2302(b). To give the Unwelcome Clause full effect, the terms "objectionable, unwelcome, unacceptable, or undesirable" must mean something besides denials or unequal services. Michigan has no response to that dilemma except to return to the Denial Clause. So the Unwelcome Clause is overbroad because it has a "substantial number of" unconstitutional "applications," but no "sweep" independent of the Denial Clause. *United States v. Stevens,* 559 U.S. 460, 473 (2010) (cleaned up). The Unwelcome Clause is facially unconstitutional.

IX. The Sixth Circuit found that Parent Plaintiffs have standing.

Michigan claims that Parent Plaintiffs' claims did not survive appeal, but that's wrong. ECF No. 98, PageID.2754. Lower courts must adhere to the higher court's mandate and cannot reconsider issues that the higher court explicitly or implicitly decided. *United States v. Dale*, 156 F.4th 757, 766 (6th Cir. 2025). An issue is implicitly decided when it's "so closely related to the earlier appeal [that] its resolution involves no additional consideration and so might have been resolved but unstated." *Id.* (quoting *In re Purdy*, 870 F.3d 436, 443 (6th Cir. 2017)).

The Sixth Circuit considered Parent Plaintiffs' claims and implicitly held that they have standing. When this Court addressed Parent Plaintiffs' standing, it held that their claims were an "extension" of Sacred Heart's and dismissed them together. Opinion & Order at 23 n.4, 29, ECF No. 44, PageID.952, 958. So too, the Sixth Circuit grouped Parent Plaintiffs with Sacred Heart. *See CHC*, 117 F.4th at 836 (defining the Sacred Heart "Plaintiff[]" as "Sacred Heart of Jesus, a Catholic school" plus "parents"); *see also id.* at 840 ("Six parents . . . are also Plaintiffs in Sacred Heart's lawsuit"). The Sixth Circuit then held that Sacred Heart had standing—without distinguishing between the school and parents. *See id.* at 855,

857. The court thus "implicitly" decided parents' standing because, as an "extension" of the school's, ECF No. 44, PageID.958, "its resolution involve[d] no additional consideration" and could be "resolved . . . unstated," *Dale*, 156 F.4th at 766 (quoting *Purdy*, 870 F.3d at 443).

X. The stipulated facts prove that the Act violates Parent Plaintiffs' religious exercise and fundamental parental rights.

Michigan's merits arguments against Parent Plaintiffs' free exercise and fundamental parental rights claims also fail. On the facts, Michigan baldly asserts that plaintiffs have "no evidence" that the Act's infringement of Sacred Heart's right to enforce its religious policies "impacts their ability to direct their children's education and raise them in the Catholic faith." ECF No. 98, PageID.2756. That's not true. Michigan *stipulated* to that evidence. Stip. ¶¶ 94–07, ECF No. 83, PageID.1450-1451.

The stipulated facts show how the Boutells' and Ugolinis' religious exercise and ability to direct their children's upbringing are infringed by the Act's provisions, which bar Sacred Heart from teaching, operating, and hiring according to the Catholic faith. *Id.* at PageID.1450-1452. As Michigan stipulates, "[t]he Boutells and Ugolinis sincerely believe that it is essential to their children's spiritual well-being that their children be surrounded by a true, good, and beautiful Catholic culture at school where students, teachers, priests, and families all strive for holiness together." Stip. 107. They "sincerely believe that formation in the Catholic faith comes not just from formal catechesis but also from learning by the example of others authentically living the Catholic faith." Stip. 106. Michigan even stipulates that "[Parent Plaintiffs] sincerely believe that if a Catholic institution, like Sacred Heart, was forced to affirm positions contrary to the Church's teachings

on marriage and sexuality, it would greatly confuse their impressionable children and hinder their moral and spiritual development." Stip. 113.

Michigan's stipulations destroy its "no evidence" claim, ECF No. 98, PageID.2756, and they prove that there is no genuine issue of fact that would preclude summary judgment for Parent Plaintiffs on either of their claims. By forcing Sacred Heart to change its policies and communicate false messages about gender identity and sexuality, the Act directly undermines Parent Plaintiffs' children's spiritual development. Stip. ¶¶ 87–88, ECF No. 83, PageID.1449. So this Court should hold that the Act "pose[s] 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill in their children," *Mahmoud v. Taylor*, 606 U.S. 522, 565 (2025), and "imposes" an "unacceptable" "burden on [parents'] religious exercise." *Id.* at 550.

Based on the same stipulated facts, this Court should also declare that the Act impermissibly infringes Parent Plaintiffs' fundamental rights to direct the "care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality), including their right "to control" their children's education. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *accord Pierce v. Soc'y of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925). Michigan concedes that these rights are fundamental and constitutionally protected. But it argues that those rights are not implicated here by relying solely on the inapposite Fifth Circuit decision in *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127 (5th Cir. 2009).

But *Cornerstone* doesn't control here. The 5th Circuit opinion is not binding on this Court. And as Michigan concedes, *Cornerstone* stands for the proposition that states may regulate matters impacting parental rights "particularly when the state's interest relates to the provision of public education." *Id.* at 136. *Cornerstone* addressed participation in a state-administered interscholastic athletic program,

not a law prohibiting the defining features of a private religious school. *See id.* *Cornerstone* recognizes Parent Plaintiffs' "prerogative to make choices regarding the type of education—*e.g.*, public, private, or home-schooling—that their child receives." *Id.* But Parent Planitiffs' right to choose a private religious school is hollow when ELCRA forbids Sacred Heart's core religious policies. Finally, to the extent that *Cornerstone* would limit fundamental parental rights to high-level choices between public and private schooling, the Supreme Court's subsequent decision in *Mahmoud* clarifies that parents have a right to control the content of educational materials provided in particular courses. *Mahmoud*, 606 U.S. at 568–569 (affirming religious parents' rights to control their children's exposure to "LGBTQ+-inclusive storybooks").

Simply put, the Act interferes with Parent Plaintiffs' religious exercise and fundamental parental rights by forcing their school of choice (Sacred Heart) to teach and operate in ways that flagrantly violate the faith that they seek to instill in their children. And the Act leaves nowhere for Parent Plaintiffs to run, as Michigan's law prohibits all schools from providing the religious education they seek. Parent Plaintiffs are entitled to summary judgment on their claims.

Conclusion

The undisputed facts show that Plaintiffs have standing, and Michigan failed to offer evidence to meet the heavy burden of mootness. The Constitution protects Plaintiffs' activities. Plaintiffs ask this Court to grant their summary-judgment motion and deny Michigan's cross-motion.

Respectfully submitted this 10th day of February, 2026.

By: s/ *Mark A. Lippelmann*

David A. Cortman
Arizona Bar No. 029490
Ryan J. Tucker
Arizona Bar No. 034382
Katherine L. Anderson
Arizona Bar No. 033104
Mark A. Lippelmann
Arizona Bar No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (facsimile)
dcortman@ADFlegal.org
rtucker@ADFlegal.org
kanderson@ADFlegal.org
mlippelmann@ADFlegal.org

John J. Bursch
Michigan Bar No. P57679
Noel W. Sterett
Illinois Bar No. 6292008
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
(202) 347-3622 Fax
jbursch@ADFlegal.org
nsterett@ADFlegal.org

Attorneys for Plaintiff

Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

This brief was produced on Microsoft® Word for Microsoft 365 MSO (Version 2509 Build 16.0.19231.20246) 64-bit. According to the word count generator within that program, the word count for this brief, including headings, footnotes, citations, and quotations, but not including the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, is 9,510.

s/ *Mark A. Lippelmann*
Mark A. Lippelmann
Arizona Bar No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (facsimile)
mlippelmann@adflegal.org

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2026, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to all counsel of record who are registered users of the ECF system.

s/ *Mark A. Lippelmann*
Mark A. Lippelmann
Arizona Bar No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (facsimile)
mlippelmann@adflegal.org

Attorney for Plaintiffs